In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 193

EARL WEST, et al., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp. A-1–A-10) is reported at 232 F. 2d 694 (C. A. 9). The memorandum opinion of the District Court is printed at R. 26.

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1956 (Pet. App. C). A timely petition for rehearing was denied on May 25, 1956 (Pet. App. D). The petition for a writ of certiorari was filed on June 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

INDIAN TRIBAL LAWS INVOLVED

Article VIII of the Constitution of the White Mountain Apache Tribe, and Article III of Ordinance No. 22 enacted by the Tribal Council in accordance with the Tribal Constitution, are printed at pages A-11, A-12 of the Petitioners' Appendix A.

QUESTIONS PRESENTED

1. Whether a white man who has grazed cattle on the White Mountain Apache Indian Reservation with gratuitous permission of the Superintendent has acquired rights under the Tribal Constitution which the Tribal Council cannot abrogate.

2. Whether members of the Tribe who have grazed cattle on the White Mountain Apache Indian Reservation with gratuitous permission of the Superintendent have acquired vested rights under the Constitution, so that the Tribal Council's ordinance requiring membership in grazing associations as a prerequisite to grazing on tribal property does not apply to them.

STATEMENT

The United States, on behalf of the White Mountain Apache Indian Tribe, instituted this action to enjoin petitioners from grazing livestock on the White Mountain Apache Indian Reservation, Arizona. Title to the land is in the United States, held in trust for the Indians. The material facts are as follows:

Petitioner Earl West is a white man. The other petitioners, his wife and children, are Indians and members of the White Mountain Apache Tribe or eligible for enrollment (R. 30). With the permission of successive superintendents of the Reservation, petitioners have grazed livestock on some 30,000 acres of

tribal land within the Reservation since about 1923.[1] Improvements have been placed upon the lands by the West family.

In 1938, the Tribe, by authority of Section 16 of the Wheeler-Howard Act, 48 Stat. 984, 25 U. S. C. 476, adopted a Constitution and by-laws (R. 41-55). Article VIII of the Constitution, relating to Tribal lands, protects "right of occupancy of long established allocations." In 1953, the Tribal Council, in order to increase the productivity of the range, enacted, and the Secretary of the Interior approved, Ordinance No. 22.[2] The Ordinance establishes grazing districts in the Reservation. In each of these districts grazing associations are to be formed by members of the Tribe in the districts, and grazing permits will be issued only to members of the associations. Article III of the Ordinance provides that "right of occupancy of reservation lands shall not include exclusive grazing privileges."

Petitioner Earl West is ineligible to join a grazing association. The other petitioners, his wife and children (other than two who are minors), are eligible to join but have refused. Petitioners based their refusal to comply with the Ordinance on the contention that, since successive superintendents had allowed them to graze on Tribal property, they have established a "right of occupancy of long established allocation" protected by the Tribal Constitution. Because the petitioners have refused to comply with the Ordinance this suit was filed.

---

[1] There are some 2,000,000 acres of grazing land on the Reservation and 1,200 families, making an average of 1,600 acres per family.

[2] The Ordinance incorporates as its objective the objectives set out in 25 C.F.R. 71, the Grazing Regulations of the Department of the Interior, regarding Indian lands under the jurisdiction of the Bureau of Indian Affairs.

Following a trial, the District Court refused to grant the injunction and held that the petitioners had acquired a "right of occupancy" which was protected by the Tribal Constitution and which the Ordinance could not abrogate (R. 26). The United States appealed. The Court of Appeals reversed, holding that the permission to graze in this area has been revoked and also that the petitioners who are members of the Tribe were protected regarding their improvements by the Ordinance.

ARGUMENT

1. Petitioner Earl West, being a white man, has no rights at all in the Tribal property and agents of the United States could not give him any. Moreover, the record is clear that the superintendents who permitted West to graze on this land did not intend to give him irrevocable rights (R. 125). As for the petitioners who are members of the Tribe but have refused to join a grazing association, their claim to special consideration, based upon the asserted vested right to graze on 30,000 acres of Tribal property, likewise lacks merit. The provision of the Tribal Constitution relied on protects only home sites, small farms and gardens, and certainly not vast areas of grazing lands. The area claimed by petitioners is approximately 19 times the amount available per family if the grazing area were equally divided among the families on the Reservation (see fn. 1, *supra*, p. 3). The Tribal Constitution surely did not intend to grant such a preference.

2. The petition also challenges the right of the Tribe to pass this Ordinance, alleging that it is contrary to the Tribal Constitution. But Article VIII gives the Tribal Council power to legislate relative to the Tribal property. The regulation of grazing in this arid section

of the country is the rule rather than the exception, and it is certainly in the best interests of the Tribe that some orderly system regarding grazing be adopted. It cannot be doubted, therefore, that this was one of the types of legislation contemplated by the Constitution.

The Ordinance gratuitously provides that the Tribal Council will negotiate with members of the Tribe for payment for improvements which may have been placed on Tribal property. The petitioners protest, since the Council will offset a "use value" of the property in determining the amounts to be paid for the improvements, that this part of the Ordinance is unconstitutional. This argument is premature since petitioners have never presented such a claim for improvements under the Ordinance, but have always contended that it was inapplicable to them.

3. This case involves an effort on the part of a Tribal Council to raise the economic level of its Tribe, an effort which has been resisted by a single white man and his Indian family. The problem is an isolated one, and it has been resolved by the Court of Appeals with jurisdiction over the area occupied by the Tribe. No general issue of law is involved, nor has any injustice been perpetrated.

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, May 25, 1956.

Before: STEPHENS and POPE, Circuit Judges, and
MATHES, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellees filed May 17, 1956, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Indian tribal laws involved	2
Questions presented	2
Statement	2
Argument	4
Conclusion	6

Statute:

Wheeler-Howard Act, Section 16, 48 Stat. 984, 25 U.S.C. 476	3

Miscellaneous:

Constitution of the White Mountain Apache Tribe, Article VIII	2, 3, 4
Ordinance No. 22, Article III	2
25 C.F.R. 71	3

CONCLUSION

The decision of the Court of Appeals is clearly correct, and no question of general importance is presented. It is submitted that further review is not warranted and the petition for a writ of certiorari should be denied.

Respectfully submitted,

OSCAR H. DAVIS,
Acting Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
REGINALD W. BARNES,
Attorneys.

JULY, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 901972 29